Filed 11/18/03 Frenchman v. Los Angeles Unified School Dist. CA2/7

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| CECILIA FRENCHMAN, a Minor, etc. et al.,<br><br>Plaintiffs and Respondents,<br><br>v.<br><br>LOS ANGELES UNIFIED SCHOOL DISTRICT,<br><br>Defendant and Appellant. | B159312<br><br>(Los Angeles County Super. Ct. No. BC233646) |

APPEAL from a judgment of the Superior Court for the County of Los Angeles, William F. Highberger, Judge. Affirmed.

Law Offices of Gary C. Bacio, Gary C. Bacio and Julia Vaynerov for Defendant and Appellant.

Law Offices of Dale K. Galipo and Dale K. Galipo for Plaintiffs and Respondents.

The Los Angeles Unified School District appeals from a judgment entered after a jury awarded Cecilia Frenchman a total of $142,500 for injuries she suffered while a student at one of the District's elementary schools. The District contends the trial court erred in admitting various items of evidence and in failing to grant a remittitur or new trial on the ground of excessive damages. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Cecilia was a nine-year-old fourth-grader who had various learning disabilities and coordination problems. When school was dismissed for the day, Cecilia usually was walked to her bus in front of the main building. If the bus was late, Cecilia would be taken by a school employee to the office to wait for the bus. On the day in question the bus was apparently running late, but Cecilia was not walked to the bus stop or the office. Instead, she and another student left the classroom by themselves and sat on a railing on a platform just outside the classroom door. Cecilia fell from the railing and broke her ankle.

Cecilia, though her guardian ad litem Sandra Frenchman,[1] filed suit against the District, alleging negligent supervision and dangerous condition of public property. At trial, the District contended Cecilia was leaning against the railing rather than sitting on top of it. A jury awarded Cecilia $30,500 for past and future economic damages and $112,000 for past and future pain and suffering. The District's motion for a new trial was denied. This appeal followed.

## CONTENTIONS

The District contends the trial court erred in (a) overruling the District's hearsay objections to testimony indicating Cecilia was sitting on the railing when she fell; (b) allowing into evidence a confidential student accident report prepared by the school

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[1] Sandra Frenchman is Cecilia's grandmother. However, she testified she has raised Cecilia since infancy and considers their relationship to be that of mother and daughter.

nurse the morning after the accident; and (c) failing to grant a new trial or remittitur on the ground of excessive damages.

## DISCUSSION

### 1. *The District Has Waived Its Hearsay Objections to the Testimony of Gayle Patrick, Celina Enriquez, Eliadora Sagales, Beatrice LaPisto and Sandra Frenchman*

In the statement of facts in its brief on appeal, the District gives several examples of what it characterizes as inadmissible hearsay statements in the trial testimony of Sandra Frenchman and school personnel Gayle Patrick, Celina Enriquez, Eliadora Sagales and Beatrice LaPisto. The District apparently contends the trial court erred in admitting this evidence, consisting of statements made at or near the time of the accident, under the "admissions" and "declaration against interest" exceptions to the hearsay rule.[2]

The argument portion of the District's brief, however, does not refer to the testimony set forth in its statement of facts or provide any legal support for its earlier assertion that the evidence was inadmissible. (See Cal. Rules of Court, rule 14(a)(1)(B) [brief must separately state and support each point by argument and, if possible, by citation of authority].) Instead, the District argues only that testimony of out-of-court statements by Cecilia was inadmissible as either an admission or a declaration against interest. But the District's own counsel elicited the challenged testimony during his examination of Sandra Frenchman. Accordingly, any objection to Cecilia's out-of-court

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[2] Although the District contends each of these witnesses was permitted to testify to out-of-court statements by others, our review of the record reveals this contention is overstated and inaccurate. For example, the District contends teacher Gayle Patrick testified to statements made by another teacher "concerning whether Cecilia was told to get off the railing." In fact, Patrick testified that she never heard anyone make such a statement to Cecilia. Similarly, the District contends that "[f]urther hearsay testimony was allowed by the court when plaintiff's counsel asked [teaching assistant Celina] Enriquez if she heard either Ms. Conde or Ms. Patrick tell plaintiff to get off the railing," and "when counsel asked this witness what Ms. Conde had said when the grandmother arrived." However, Enriquez denied hearing or remembering what the teachers said on those occasions.

statements has been waived. (*People v. Williams* (1988) 44 Cal.3d 883, 912 ["It is axiomatic that a party who himself offers inadmissible evidence is estopped to assert error in regard thereto."].)

The District has failed to provide us with any authority to support its position that out-of-court statements by school personnel were not properly admitted, beyond its *ipse dixit* that such statements were "prejudicial." "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; see also *Akins v. State of California* (1998) 61 Cal.App.4th 1, 50 [waiver of contention by failure to cite any legal authority].)[3]

2. *The Trial Court Did Not Abuse Its Discretion in Admitting the Confidential Student Accident Report*

a. *The District Waived Any Privilege With Respect to the Accident Report*

The trial court admitted into evidence a document captioned "Confidential Report of Student Accident," which bore a legend stating, "This is a confidential report for transmission to and use by attorneys for the Los Angeles Unified School District." The document further recites, in bold type, "No copy of a student accident report shall be retained by the school, or given to anyone, including the student or parent." Despite these warnings, the report was provided to the District's expert witness, Carl Sheriff, and produced to Cecilia's counsel at Sheriff's deposition.[4] Moreover, school nurse Eliadora

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[3] Although we need not decide the matter in light of the District's waiver, our review of the record indicates the trial court's evidentiary rulings were well within its discretion.

[4] The District asserts no waiver occurred because its expert testified he did not actually rely on the report as a basis for his opinion. By calling Sheriff as an expert to testify at trial, however, the District waived any otherwise applicable privilege with respect to all information provided to its expert for his use. "[T]he privilege [for confidential information communicated by a client] is lost upon designation of the expert as a witness because the decision to use the expert as a witness manifests the client's consent to disclosure of the information." (*Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, 1079; see *Sanders v. Superior Court* (1973) 34

Sagales, who prepared the report, read a portion of the report from the witness stand without objection from the District. These disclosures waived any privilege that might originally have attached to the report. (Evid. Code, § 912 [privilege is waived when holder of the privilege discloses contents of privileged communication to third party or fails to object to such disclosure]; *Kaiser Foundation Hospitals v. Superior Court* (1998) 66 Cal.App.4th 1217, 1227 [attorney-client privilege and work product doctrine are waived when a significant part of privileged or work product communication has already been disclosed to third parties].)

b. *The District Waived Its Hearsay Objections to the Contents of the Report*

During direct examination by Cecilia's counsel, Sagales testified that she prepared the report the morning after the accident. Under questioning from counsel, Sagales read a portion of the report with no objection from the District's counsel. By permitting the jury to hear the contents of the report, the District has effectively waived any hearsay objections to the report itself. (Evid. Code, § 353; *Platzer v. Mammoth Mountain Ski Area* (2002) 104 Cal.App.4th 1253.) Moreover, the District has not provided us with any legal authority or analysis in support of its hearsay objection to the contents of the accident report or its contention that portions of the report should have been redacted.[5] Accordingly, we may properly treat the District's hearsay argument as waived. (*Badie v.*

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Cal.App.3d 270, 279 ["[T]he information and opinion of an expert respecting the subject matter about which he is a prospective witness are subjects of discovery by interrogation or deposition procedures, and, if submitted in a report confined thereto, by production of such a report."].) *People v. Coleman* (1985) 38 Cal.3d 69, 92-93, upon which the District appears to rely, holds only that the trial court may exercise its discretion under Evidence Code section 352 to limit questioning and exclude inflammatory portions of the information provided the expert. The District made no section 352 objection at trial.

[5] *People v. Coleman, supra,* 38 Cal.3d 69, the single authority cited by the District in connection with the admission of the report, stands only for the proposition that "highly emotional and inflammatory letters" written by one of the defendant's victims and offered only for non-hearsay purposes may nevertheless be excluded pursuant to Evidence Code section 352.

*Bank of America*, *supra,* 67 Cal.App.4th at pp. 784-785; *Akins v. State of California*, *supra,* 61 Cal.App.4th at p. 50.)

3. *The Trial Court Did Not Err in Denying the Motion for a New Trial Based on Excessive Damages*

Finally, the District contends the jury's award of $142,500 was excessive and constitutes grounds for a new trial. (Code Civ. Proc., § 657 [verdict may be modified or vacated or new trial granted based on "excessive or inadequate damages"].) The District simply argues we should reduce the damages or grant a new trial based on *its* view of the evidence. Tellingly, however, it does not contend the jury's verdict was not supported by substantial evidence. It also fails to recognize that, when a claim of excessive damages has been rejected by the trial court on a motion for a new trial, the trial court's determination must be accorded great weight because it is the province of the court to judge the credibility of the witnesses and to weigh the evidence. (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64.)

In ruling on the motion for new trial, the trial court found: "As far as excessiveness of the damage, it's true that at the time of trial plaintiff had had approximately $5,000 of surgery, and other medical bills, but there was evidence taken in the light most favorable to plaintiff that she was foreseeably going to need tens of thousands of dollars of additional surgery to be sure that her legs grew to an even length as she completed her growth, and that the non-economic damages were not an unreasonable ratio of the full past and future medical expenses. And plaintiff was under no obligation to call the minor to the stand. And the minor is a special needs child . . . I find nothing improper about the plaintiff's failure to call the minor plaintiff as a witness. And the damages in my view were within the realm of the discretion that we afford to the jury." The trial court's ruling was within its discretion and was supported by substantial evidence in the record.[6]

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[6] Although the District contends Cecilia will not require further medical treatment, the jury found otherwise and awarded economic damages of $30,500, which included an

## DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

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PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.

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allotment for future medical treatment. This award was supported by the evidence: Cecilia's physician Dr. Gabriel Rubanenko testified surgery would be required to prevent future leg-length discrepancy. Dr. Rubanenko also testified that Cecilia had ongoing pain, swelling and restricted range of motion in the affected leg. Cecilia's grandmother testified Cecilia had been in a cast for six months and missed more than half a year of school following the accident. And several witnesses testified to Cecilia's pain and hysteria at the time of the accident. In light of this evidence, the jury's award of $112,000 for past and future pain and suffering was supported by substantial evidence.